No. 11200

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY, a corporation, and LOS ANGELES & SALT LAKE RAILROAD COMPANY, a corporation,

Appellants,

vs,

W. L. OLIVE,

Appellee.

OPENING BRIEF OF APPELLANTS

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

STATUTES.

TEXT BOOKS.

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STATEMENT OF THE CASE

On March 31, 1941, W. L. Olive, a resident of Clark County, State of Nevada, filed his verified Complaint in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, to recover damages in the sum of $64,724.08, for his alleged wrongful suspension and discharge from the service of the Union Pacific Railroad Company and the Los Angeles & Salt Lake Railroad Company, both corporations alleged to be organized and existing under and by virtue of the laws of the State of Utah.

On April 9, 1941, defendants caused said action to be removed to the United States District Court for the District of Nevada, upon the ground that the action was one of a civil nature, being an action to recover damages for an alleged breach of contract; that the value of the matter in controversy was in excess of $3,000,000; and that the controversy was entirely between citizens of different states. (P. R. 13-31).

Thereafter, the defendants answered the complaint,

denying the material allegations thereof, setting up estoppel as an affirmative defense, and pleading in bar the four year Statute of Limitations. (Sec. 8524, N. C. L. 1929) (P. R. 31-38.) On February 19, 1945, by stipulation of counsel and leave of Court, plaintiff filed an amendment to his complaint, which, in substance, incorporated by reference certain portions of the agreement in writing between the Brotherhood of Railway Carmen of America and the corporate defendants (P. R. 38-40). The material allegations of this amendment to plaintiff's complaint were denied by defendants in their answer, with the exception of the allegation that such agreement had been made. (P. R. 41)

On February 24, 1945, plaintiff moved to strike from defendants' answer, Paragraph III of the Second Defense, setting up certain affirmative matter not material here, and all of the Third Defense, setting up in bar the four year Statute of Limitations. (P. R. 42). The motion was submitted to the Court on briefs and oral argument of counsel, and the Court thereafter made its Order sustaining plaintiff's motion, to which Order defendants duly excepted. (P. R. 144 and 147)

By stipulation of counsel, plaintiff thereafter filed a supplement to his complaint, setting forth damages alleged to have accrued since the date of filing of his original complaint, as a result of his alleged wrongful discharge. (P. R. 12-13)

On the issues so made, a trial was had by the Court sitting with a jury, resulting in a verdict in favor of plaintiff in the sum of $8,675.40 damages, with interest and costs. Final judgment was entered thereon on March 26, 1945. (P. R. 174-175)

The following day, defendants moved for judgment notwithstanding the verdict, or, in the alternative, for a new trial. (P. R. 176-179). This motion was submitted on

briefs and denied by the Court in a Memorandum Opinion dated May 22, 1945, on the ground that a jury question had been presented upon conflicting evidence. (P. R. 180-181)

Defendants then noticed the present appeal from the final judgement entered in this action on March 26, 1945. Notice of appeal was filed on August 20, 1945, and appears at page 181 of the Printed Record. A statement of points on appeal was duly served and filed, and is included at page 184 of the Printed Record. The specific errors assigned will be considered hereafter in connection with the discussion of the points involved.

BRIEF STATEMENT OF FACTS AND QUESTIONS INVOLVED

Briefly stated, the questions involved in this appeal, may be resolved into two points:

Point One: Did the trial Court err in holding that Appellee's cause of action was not barred by the four year Statute of Limitations, and, accordingly, in sustaining Appellee's Motion to Strike the Third Defense of Appellants' Answer, setting up the four year Statute of Limitations in bar?

Point Two: Was the verdict in favor of Appellee sufficiently supported by the evidence, or was it contrary to the evidence and so plainly excessive as to indicate that it had been awarded under the influence of passion or prejudice?

So far as material to the present appeal, the facts upon which these questions arise may be summarized as follows:

Appellee, since May 9, 1925, had been employed by Appellant Los Angeles & Salt Lake Railroad Company, an interstate carrier by rail, at its yards at Las Vegas, Nevada, as a car repairman and car inspector. At a subsequent time, Appellant Union Pacific Railroad Company, an interstate carrier by rail, succeeded to the interest of Appellant Los Angeles & Salt Lake Railroad Company, and took over the operation of its rights of way, rolling stock, and other facilities. Since it is conceded that if there is any liability, it is chargeable to Appellant Union Pacific Railroad Company, as successor of Appellant Los Angeles & Salt Lake Railroad Company (P. R. 44), both corporate Appellants, will hereafter be referred to as the Railroad or Appellants.

On November 1, 1934, while the Appellee was so em-

ployed, the Railroad and the Brotherhood of Railway Carmen of America, a labor organization of which Appellee was a member and which was the recognized bargaining agent for the craft or class to which Appellee belonged, entered into an agreement in writing, setting forth the rights and duties of the Railroad and its empolyees of Appellee's craft or class collectively with respect to rates of pay, rules, and working conditions. A copy of this agreement is annexed to the amendment to Appellee's complaint as Exhibit "A" and appears, in part, at pages 39-40 of the Printed Record.

The relevant portions of this agreement, set forth in haec verba in Paragraph XI of Appellee's Complaint, at Page 7 of the Printed Record, read as follows:

> Rule 37. "No employee shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee shall be apprised of the precise charge against him. The employee shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by counsel of his choosing. If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."
>
> Rule 38. "No journeyman mechanic or regular helper who has been in the service of the railroad ninety days shall be dismissed for incompetency, neither shall an employee be discharged for any cause without first being given an investigation."

It is not disputed that on or about February 25, 1934, Appellee while employed by the Railroad, and in the course of such employment, fell from the top of one of the Appellants' passenger cars, and fractured his left arm. As a result of his injuries, it is conceded that Appellee was physically disabled and unable to perform the duties of a car man from the date of his injury until May 25, 1936. Appellants' evidence tends to show that the disability continued until a later date, but this is contradicted by Appellee's testimony. It is not disputed, however, that from the date of the accident until May 25, 1936, Appellee was out of service on leaves of absence authorized by the Railroad at his own written request. It is also conceded that on May 4, 1935, the Railroad made a settlement with Appellee, paying to Appellee the sum of $5,000.00, and that in consideration for this payment, Appellee executed a release of all claims for personal injuries, loss of services, and medical and other expenses arising from the accident.

Appellee's complaint alleges, however, that on May 25, 1936, Appellee was unlawfully and without cause suspended from service and remained suspended until August 20, 1936, at which time Appellee was unlawfully and without cause dismissed and discharged from the service of Railroad (P. R. 7-8). In support of the allegation that Appellee's suspension and subsequent discharge were unlawful and without cause, it is further alleged that Appellee was never apprised of the precise charge against him, was not given an investigation, was not given a hearing by a designated officer of the Railroad, and was not afforded an opportunity to secure the presence of witnesses on his behalf or the right to be present in person or by counsel in connection with the causes for suspension of discharge, all presumably in breach of the provisions of Rules 37 and 38 of the agreement of November 1, 1934, between the Brotherhood and the Railroad (P. R. 8-9). The complaint

also alleged, that in pursuance of the terms of the agreement of November 1, 1934, Appellee was entitled to lifetime employment with the Railroad, or, in the alternative, until he should reach the age of 65 years (P. R. 10).

Three defenses were set up by Appellants in their Answer. The first defense is in the form of a general denial of the material allegations of the complaint, and sets up affirmatively that at the time of Appellee's employment by the Railroad, it was mutually agreed, among other things, that no permanent employment was contracted for and that the term of Appellee's employment was subject to the decision of the Railroad, and that Appellee during his employment, would abide by certain rules and regulations of the Railroad then in force or which might thereafter be adopted, including the Railroad's Hospital Department Regulations and Rules Governing the Determination of Physical Qualifications of Employees (P. R. 22). The second defense sets up Appellee's injury on February 25, 1934, alleges his physical disability as a result thereof to perform his duties of car man until May 28, 1938, and pleads the release above mentioned (P. R. 33-36). The third defense sets up in bar **Section 8524, Nevada Compiled Laws, 1929**, providing a four year limitation of actions upon a contract, obligation, or liability, not founded upon an instrument in writing (P. R. 36-38). This defense was predicated upon the theory that Appellee's cause of action, if any, was upon his parol contract of hiring rather than upon the subsequent collective bargaining agreement of November 1, 1934; that such cause of action, by Appellee's own allegations, accrued on August 20, 1936, or more than four years prior to the commencement of the present action on March 31, 1941. As already noted, however, the portion of the second defense pleading the release, and all of the third defense, were stricken from Appellant's Answer on motion of Appellee.

On issues so made, Appellant introduced evidence tending to show that Appellee was physically disqualified from reinstatement to his duties as car man at least until October 22, 1937, at which time one of the Railroad Company's doctors found him qualified. Appellants' evidence also tended to show that, on several occasions subsequent to this date, and, at all events no later than on October 21, 1938, the Railroad offered to restore Appellee to his duties as car man without prejudice to any claim which Appellee might choose to assert for compensation for the period of his suspension, but that Appellee declined and refused to return to work unless first compensated for wages lost during the suspension period. This evidence is contradicted by Appellee's own testimony to the effect that, at all times after May 25, 1936, he was ready, able, and willing to return to work for the Railroad, repeatedly requested reinstatement, and offered to go back to work and negotiate settlement of his claim for wage loss during the suspension period at a later date, but that the Appellants refused to reinstate him unless he would first waive his claim for such compensation.

Upon -this evidence, the jury returned a ver dict in favor of Appellee, in the sum of $8,675.40. The sufficiency of the evidence to sustain this verdict, and whether or not the verdict was contrary to the evidence will be considered in detail under Point Two of this Brief.

POINT ONE

The United States District Court erred in holding that Appellee's cause of action was not barred by the four year Statute of Limitations, and, accordingly in sustaining Appellee's Motion to Srike the Third Defense of Appellants' Answer, setting up the four year Statute of Limitations in bar.

Under this heading, we propose to discuss appellants' first and second assignments of error, which may be found at page 184 of the Printed Record.

It appears from Appellee's Complaint that his cause of action, if any, accrued on the 20th day of August, 1936, the day Appellee alleges that he was wrongfully discharged or dismissed from Appellants' service. This action was not commenced until March 31, 1941, or four years and seven months after Appellee's cause of action accrued. In the third defense, contained in Appellants' Answer herein, Appellants alleged that by reason of the premises Appellee's cause of action was barred under **Section 8524, Nevada Compiled Laws, 1929**, the pertinent portion of which reads as follows:

> "Actions other than those for the recovevry of real property, can only be commenced as follows: . . .
>
> "Within four years: . . .
>
> 3. An Action upon a contract, obligation or liability, not founded upon an instrument in writing."

The applicability of **Section 8524, N. C. L., 1929**, depends in turn, upon the construction placed by the Court upon Appellee's cause of action. It is Appellants' position that Appellee's cause of action, if any, is upon his parol contract of employment, entered into between Appellee and Appellants on May 9, 1925. If this position is correct, Appellee's action would obviously be upon a contract "not founded upon an instrument in writing," and subject to

the bar of the four year Statute of Limitations. Appellee contends, however, that he is suing for breach of the written agreement entered into November 1, 1934, between the Brotherhood of Railway Carmen of America, of which Appellee was then a member, and the Railroad. If Appellee's contention is correct, the action would be governed by the six year Statute of Limitations applicable to actions "upon a contract, obligation, or liability, founded upon an instrument in writing," and would have been timely brought.

Before we discuss the merits of this question, it is pertinent to point out that this case is before the federal courts solely upon the basis of diversity of citizenship of the parties, and that no question of federal law is involved. Although Appellants herein are interstate railroads, this is not an action brought under the **Railway Labor Act, 45 U. S. C. A., Sections 151 164.** to enforce an award of a Railroad Adjustment Board, and the two year Statute of Limitations provided in the Act for actions of that character is consequently not involved. **Order of Railroad Telegraphers v. Railway Express Agency, Inc.,** 321 U. S. 342 88 L. Ed. 788. See also **Burke v. Union P. R. Co.,** 129 F (2) 846; **Swartz v. So. Buffalo Ry. Co.,** 44 Fed. Supp. 448.

The present action is a common law action to recover damages for the alleged breach of a contract of employment. It is elementary, that this is a question of state law. And, it is equally well settled that, under **28 U. S. C. A., Section 724,** commonly known as the **Conformity Act,** and **28 U. S. C. A., Section 725, the Federal Rules of Decision Act,** in the absence of provisions in the federal statutes expressly regulating the matter, the federal courts will be governed by the applicable state Statute of Limitations and the construction placed thereon by the highest court of the state. **Erie Rd. Co. v. Tompkins,** 304 U. S. 64, 182 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487; **Moore v. Illinois Central Railroad Company,** 312 U. S. 630, 85 L. Ed. 1089, 136 F (2) 412.

In the case last cited, to which we shall have occasion to advert again hereafter, the specific question involved was whether the state Statute of Limitations applicable to oral or to written contracts governed, and for failure of the Circuit Court of Appeals to follow the ruling of the State Supreme Court on this question, the judgment of the Circuit Court of Appeals was reversed by the Supreme Court of the United States.

So far as we have been able to ascertain, there has never been a specific adjudication of the Supreme Court of Nevada as to whether a common law action for damages for wrongful discharge is an action upon the parol contract of hiring establishing the employer-employee relationship (and therefore subject to the four year Statute of Limitations) or upon a subsequently executed agreement between the employer and a union of which the Appellee is a member regulating the terms of that employment, violation of which terms is alleged to make the discharge wrongful. In the absence of such adjudication, we submit that it is open to this Court, in reviewing the decision of the District Court upon this question, to make the determination for itself. **Moore v. Illinois Central Railroad Company**, 312 U. S. 630, 85 L. Ed. 1089, 136 F 2nd 412, supra.

Let us state at the outset that we do not question the validity of collective bargaining agreements in general, nor of the agreement of November 1, 1934, in particular, nor do we doubt that in an appropriate case such agreements may be enforced by the individual employees who are members of the contracting union and who, by express or implied ratification of such agreement have become entitled to assert rights thereunder. **Rentschler v. Missouri Pacific Rd. Co.**, (1934, Neb.) 126 Neb. 493, 253 N. W. 694, 95 A. L. R. 1; **Yazoo & M. V. R. Co. v. Webb**, (1933, C. C. A. 5th), 64 F (2d) 902. But, it is our position that an employee who, by ratification or adoption, has incorporated

the terms of the collective bargaining agreement between his union and his employer into his own individual contract of employment, which in the instant case antedates the collective bargaining agreement by nearly ten years, in suing for damages for alleged breach of such terms is suing upon his individual contract of employment and not upon the collective bargaining agreement. **Illinois Central Railroad v. Moore** (1940, C. C. A. 5th) 112 F (2d) 959, rehearing denied Aug. 8, 1940, reversed on other grounds in **Moore v. Illinois Central Railroad Company**, (1941) 312 U. S. 630, 85 L. Ed. 1089, 136 F (2) 412.

The place of collective bargaining agreements in the law of contracts has been mooted by more than one court in recent years, since the growth of labor organizations and the widespread acceptance of the practice of collective bargaining have repeatedly crowded this question upon judicial dockets. The traditional view of such agreements is stated by Commons & Andrews, in their **Principles of Labor Legislation**, 1920 Edition, at page 18, as follows.

> "The so-called 'contract' which a trade union makes with an employer or employers' association is merely a 'gentlemen's agreement,' a mutual understanding, not enforecable against anybody. It is an understanding **that, when the real labor contract is made between the individual employer and the individual employee,** it shall be made according to the terms previously agreed upon."

From this initial concept, many courts have evolved the doctrine that the collective bargaining agreement, though a valid and enforceable contract as between the employer and the union, and though precluding by its very existence inconsistent individual contracts, is still not the equivalent of the individual contract of employment, but is simply the standard of reference used by the individual

employee and the employer in entering into the contract of hiring. This appears to be the view of the Supreme Court of the United States as expressed in the two recent cases of **J. I. Case Co. v. N. L. R. B.**, (1944) 321 U. S. 332, 88 L. Ed. 762, and **Order of Railroad Telegraphers v. Railway Express Agency** (1944), 321 U. S. 342, 88 L. Ed. 788, which we shall discuss more fully hereafter.

Under this view, the only material difference between the older and the more modern authorities, is that the latter are more liberal in finding circumstances amounting to ratification or adoption by the individual employee of the terms of the collective bargaining agreement and the incorporation thereof into his individual contract of employment. **Rentschler v. Missouri Pacific Rd. Co.**, supra; **Yazoo & M. V. R. Co. v. Webb**, supra. Thus in the Webb case, exemplifying the modern view on this subject, in holding that a collective bargaining agreement, purporting to establish terms of employment for all employees of the craft or class whether or not members of the union, could be construed as having been adopted by a colored employee not eligible for membership in the union, merely by reason of the fact that he was working under it, the Circuit Court of Appeals clearly enunciated the essential duality of the collective bargaining agreement on the one hand, and the individual contract of hiring on the other. We quote from its opinion, commencing at page 903 of 64 F 2d:

> "An agreement upon wages and working conditions between the managers of an industry and its employees, whether made in an atmosphere of peace or under the stress of strike or lockout resembles in many ways a treaty. . . . But in itself it can rarely be a subject of court action because it is incomplete. **It establishes no concrete contract between employer and employee. No one is bound thereby to serve, and the employer is**

not bound to hire any particular person. It is only an agreement as to the terms on which contracts of employment may be satisfactorily made and carried out. It is a mutual general offer to be closed by specific acceptances. When negotiated by representatives of an organization it is called collective bargaining, but ordinarily the laws of the organization, which constitute the authority of the representatives to act, do not require the individual members to serve under it, but only that if they serve they will do so under its terms and will join in maintaining them as applied to others. When the agreement is published by the managers, it becomes until abrogated the rule of that industry and any individual who thereafter continues in its employment or takes new employment takes on the terms thereby fixed. Ordinarily, as in this case, there is no period fixed for the hirings and they are at the will of the parties, the employer having the right to discharge at any time and the employee having the right to quit. But the employment though indefinite as to time is a relationship while it lasts, and is subject to the conditions fixed in the working agreement for the industry.''

The **Webb** case was cited with approval, and almost identical language was used to express the relationship between the collective bargaining agreement and the individual contract of employment in the **Rentschler** case, supra, a well-considered opinion reviewing many of the authorities on this subject. In that case, the mere taking of employment with knowledge of the terms of the collective bargaining agreement was held sufficient evidence of ratification to constitute an acceptance by the employee of what had theretofore been merely ''a mutual general offer'' and to enable the employee to maintain action against the

employer for damages for his discharge in violation of the seniority provisions of the agreement.

If a collective bargaining agreement between a labor union and an employer, in and of itself, created contractual relations between the members of the union and the employer, it would necessarily follow that where the collective bargaining agreement is for a fixed term the employees covered thereby would also hold their employment for a fixed term. But it has been settled by numerous decisions that such is not the case, and that the general rule (stated in **39 C. J., Sec. 18 b)** that a hiring for an indefinite term is presumed to be at will also applies to employees covered by a collective bargaining agreement for a fixed term. "It is well settled," says Teller, "that a collective bargaining agreement, though for a fixed term, does not, in the absence of any other provision, obligate the employer to continue in his employ the employees covered by the agreement, for the duration thereof. The at-will nature of the employment is not changed by the fixed term of the collective bargaining agreement." Teller: **Labor Disputes and Collective Bargaining,** Vol I, page 504, par. 168, footnote 95. This doctrine is supported by the following authorities: **Amelotte v. Jacob Dold Packing Co.**, (1940) 173 Misc. 477, 17 NYS 2d 929, affirmed without opinion in (1940) 260 App. Div. 984, 24 NYS 2d 134; **Hudson v. Cincinnati etc. Ry. Co.**, 152 Ky. 711, 154 S. W. 47, 45 LRA (NS) 184, Ann Cas 1915 B 98; **Louisville etc. R. Co. v. Bryant,** (1936) 263 Ky. 578, 92 SW 2d 749; **St. Louis etc. Ry. Co. v. Matthews,** (1897) 64 Ark. 398, 42 S. W. 902; **Lambert v. Ga. Power Co.,** (1936), 181 Ga. 621, 183 S. E. 814; **Cross Mountain Coal Co. v. Ault,** (1928) 157 Tenn. 461, 9 S. W. 2d 692; **Swart v. Huston,** (1941) Kans. 117 P. 2d 576. All of these cases recognize the dual nature of employment under collective contracts, or what might appropriately be called the "two contracts

doctrine.'' In the last cited case, the distinction between the collective bargaining agreement and individual contracts of hiring made pursuant to its terms is stated in the following language, appearing at page 578:

> ''**But a collective bargain between an employer of labor and a labor union does not ordinarily constitute a contract of employment between the employer and any individual member of the union. He and his employer make their own contract impliedly at least if not expressly. The collective bargain between employer and union outlines the general conditions under which the business shall be conducted in respect to wages, hours of labor, working conditions, and matters incidental thereto. Ordinarily the collective bargain does not make of itself a contract of employment between A as an employer and B as workman which either can enforce, or which will furnish the basis for an action for damages if it is breached. This is settled textbook doctrine.** Thus in the article on Labor, 16 R. C. L. 425, it is said: 'It has been pointed out that the ordinary function of a labor union is to induce employers to establish usages in respect to wages and working conditions which are fair, reasonable and human, leaving to each of its members to determine for itself whether and for what time he will contract with reference to such usages. It has therefore been decided that a labor union, in contracting with an employer with respect to wages and conditions of service for a specified period of time, does not establish contracts between its individual members and the employer, a breach of which will sustain actions by the individuals.'
>
> ''Supporting this statement of law are **Hudson v. Cincinnati, N. O. & T. P. Ry. Co.**, 152 Ky. 711, 154 S. W. 75, 45 LRA (N. S.) 184, Ann. Cas. 1915 B, 98; **Piercy v.**

Louisville & N. R. Co., 198 Ky. 477, 248 S. W. 1042, 33 A. L. R. 322 and annotation; **Southern Ry. Co. v. Morris**, 210 Ala. 463, 98 So. 387; **Panhandle & S. F. Ry. Co. v. Wilson**, (Tex. Civ. App.) 55 S. W. (2d) 216; **Kessell v. Great Northern Ry. Co.**, (D. C.) 51 F. (2d) 304 . . ."

That a collective bargaining agreement between a labor union and an employer does not, in and of itself, create individual contracts of employment between the employer and the union members is further illustrated by the case of **Harper v. Local Union No. 520, I. B. of E. W.** (1932, Tex. Civ. App.) 48 S. W. 2d 1033, where a labor union sought to enjoin violation by an employer of a provision in the collective bargaining agreement wherein the latter had agreed to employ none but union members in good standing. Defendant contended that since the collective bargaining agreement constitutes a contract for personal services, which defendant could not have enforced by injunction, injunction should not lie at the suit of the union, for lack of mutuality of remedy. Holding the suit maintainable, the Court said at page 1041:

"Appellants' second proposition that injunction will not lie at the suit of the union because the contract is one for personal service, which could not be compelled by injunction, and therefore as to that remedy it is lacking in mutuality, is supported by decisions in several jurisdictions. **We have reached the conclusion, however, that the contract in its collective aspect is not one for personal service. In so far as it may inure to the benefit of the individual members of the union, it does not purport to bind the employers to employ any particular workman, or to continue in business; nor does it purport to bind any particular workman to work for appellant, or in fact to continue a member of**

> the union, or in the particular line of employment. It does bind the employers however, to its several terms if they continue in the business, and it becomes a part of the contract of each member of the union on entering the employment of appellant. The right of discharge for any valid reason is not affected by the contract on the one hand; and the right to leave the employment for any valid reason is likewise not affected on the other . . ."

These examples of what we have called the "duality" of collective bargaining agreements or the "two contracts doctrine" could be multiplied. But we think it unnecessary to try the patience of the court with further quotations from cases dealing with this question in general, since we believe that the specific question of whether an action for damages for wrongful discharge is to be governed by the Statute of Limitations applicable to the parol contract of hiring or by the Statute of Limitations applicable to the written collective bargaining agreement, violation of which is alleged to make the discharge wrongful, has been determined in a persuasive opinion by the 5th Circuit Court of Appeals in **Illinois Central Rd. Co. v. Moore** (1940), 112 F. 2d 959, rehearing denied Aug. 8, 1940. On its facts, this case is almost on all fours with the case at bar. Consequently, we feel that it merits review in some detail.

It appears that prior to 1926, the Plaintiff, a member of the Switchmen's Union of North America, which had a collective labor agreement with the Alabama & Vicksburg Ry. Co., was working as a switchman for the railroad. In 1926, Defendant Railroad took over the Alabama & Vicksburg Ry. Co., expressly assuming performance of the collective labor agreement. In the course of the consolidation of the two roads, plaintiff's number on the new seniority roster was moved from the 37th to the 52nd place, resulting

in partial unemployment. Plaintiff, claiming to be entitled to seniority under the old roster established under the Switchmen's Union contract, brought an action against the railroad for damages caused by the partial unemployment. In this litigation, reported in **Moore v. Yazoo & Miss. Valley R. R. Co.**, 176 Miss. 65, 166 So. 395, plaintiff was unsuccessful.

Plaintiff, not unlike Appellee in the instant case, then took a year's sick leave, but, upon reporting back to work at the expiration of this period, was discharged as an unsatisfactory employee. At his own request, plaintiff was given a hearing at which various reasons for his discharge were assigned, but, as the jury later found, the real reason for the discharge was the action which plaintiff had brought under the Switchmen's Union contract. From this hearing, plaintiff appealed to the General Manager, but, instead of appearing at the appointed time, brought an action in the State court to recover damages for his discharge, alleging that at the time of his discharge he was a member of the Brotherhood of Railroad Trainmen, which, since 1924, had had a collective bargaining agreement with defendant, providing, among other things, that no employee should be discharged without just cause.

Defendant's special pleas, including the bar of the three year Statute of Limitations applicable to unwritten contracts, were held good on demurrer in the trial court, but, on appeal, the State Supreme Court reversed and remanded the cause, holding that the Statute of Limitations applicable to written contracts governed. **Moore v. Illinois Central Rd. Co.**, 180 Miss. 276, 176 So. 593. Plaintiff then amended his complaint to claim damages in excess of $3,000.00, and the cause was removed to the United States District Court on the basis of diversity of citizenship. The District Judge, considering himself bound under the doctrine of **Erie Rd.**

Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 ALR 1487, by the decision of the State Supreme Court, resolved all questions of law in favor of the plaintiff. On appeal, however, the Circuit Court of Appeals for the 5th Circuit ruled the doctrine of the **Tompkins** case inapplicable, and, reconsidering the merits, **held squarely that an employee who brings action for damages for wrongful discharge sues upon his parol contract of hiring and not upon the written collective bargaining agreement between his union and the employer regulating the conditions of discharge, and that, in consequence, the Statute of Limitations applicable to parol contracts is controlling.** In reaching this conclusion, the Circuit Court said at page 964:

> "We are unable to agree that a single employee suing on his contract of employment to enforce his individual right to recover pay or for damages for discharge sues directly upon the collective agreement as a complete contract made for his benefit. See **Yazoo & Miss. Valley Ry. Co. v. Sideboard**, 161 Miss. 4, 133 So. 669. The federal statutes above referred to speak of the collective agreement as 'an agreement concerning rates of pay, rules, and working conditions,' (45 U. S. C. A. par. 152 (1) (6), but the individual's contract is referred to as 'the contract of employment between the carrier and each employee.' (45 U. S. C. A. par. 152 (8)). **The collective agreement may contain a contract between the union and the carrier, as for an open or closed shop, collection of union dues, and the like, but it is not itself a contract of employment. It binds no one to serve the carrier and binds the carrier to hire no particular person. It is only a basis agreed upon as mutually satisfactory for making contracts of employment .The contracts of employment arise when individual men**

present themselves, are examined touching their knowledge of the railroad rules and other things, and stand the required physical examinations, and are severally accepted as employees. Or they arise tacitly when old employees, after the publication of the collective agreement, continue to work. . . . When the collective agreement, tacitly or expressly, is taken as supplying any or all of the terms of the service of a particular employee, it still is not the contract, but only a standard to which the parties have referred in making their parol contract. Such is the view deliberately adopted by this court in a case where a single employee was asserting a right to the pay fixed in the collective agreement, where we held the employee, though not a member of the Union which made the agreement, was employed under its terms. **Yazoo & Miss. Valley Rd. Co. v. Webb,** (5th Cir.) 64 F. (2d) 902. A similar view is maintained both in Kentucky and in Tennessee, where the contract before us also operates. **Hudson vs. Cincinnati, etc. Ry. Co.,** 152 Ky. 711, 154 S. W. 47, 45 L. R. A. N. S., 184, Ann. Cas. 1915 B, 98; **Cross Mountain Coal Co. v. Ault,** 157 Tenn. 461, 9 S. W. (2d) 692. A recent well considered case in which all the authorities are reviewed is **Rentschler v. Missouri Pac. R. R. Co,** 126 Neb. 493, 253 N. W. 694, 95 A. L. R. 1. In it the Webb case was cited with approval and its holdings adopted. See also **Gary v. Central of Georgia Ry.,** 37 Ga. Appl. 744, 141 S. E. 819; Id. 44 Ga. App. 120, 123, 160 S. E. 716. The collective agreement as such is made, defended and changed by the union, but the rights of each employee under it are his own, and he may waive or assert them himself, as he sees fit. **Piercy v. Louisville & N. R. R. Co.,** 198 Ky. 477, 248 S. W. 1042, 33 A. L. R. 322.

"It follows clearly that when an individual employee

sues for damages for a breach of his contract of employment because of a discharge contrary to the collective agreement, as Moore does; or because he was not paid the wages fixed in the collective agreement, as Webb did (Yazoo & Miss. Valley R. R. Co. v. Webb, supra), he is not suing on the written collective agreement, but upon his parol contract of hiring, which adopted those terms of the collective agreement which are applicable to him. Moore's contract of employment in 1933 would not be established by merely proving this written collective agreement made in 1924 by a union to which he did not belong and with a railroad for which he did not work. . . .

"His contract of employment standing thus, and no federal statute providing any limitation, we think the pleaded State statute of three years may apply: 'Actions . . . on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued, and not after.' Mississippi Code, Sec. 2299. It is well settled that a contract is unwritten if the contract itself cannot be proven wholly by writings. (37 C. J., Limitations, Section 86.) 'If there is any break in the chain of the writings and such break has to be supplied by parol testimony, then the three years' statute applies and not the six years' . . . Any break in the writing or writings which is material and provable only by parol brings the three years' statute into operation.' **City of Hattiesburg v. Cobb. Bros. Const. Co.**, 174 Miss. 20, 163 So. 676, 678. **It is not apparent from the petition that Moore's contract of employment is wholly provable in writing, and the plea of the three year statute should not have been stricken on demurrer.**"

We believe that this decision of the Circuit Court of Ap-

peals for the 5th Circuit states the law correctly, and, in fact, reaches the only conclusion which can logically be reached under the "two contracts doctrine," which, as we have already pointed out, is settled doctrine in numerous jurisdictions. It is true, that this decision was reversed by the United States Supreme Court in **Moore v. Illinois Central Railroad Company**, (1941) 312 U. S. 630, 85 L. Ed. 1089, 136 F (2d) 412, but, as we have already noted, the sole ground of reversal was that the question of the applicable state Statute of Limitations having been passed upon by the State Supreme Court in an earlier phase of the litigation, under the **Rules of Decision Act** (28 U. S. C. A. 725) and the rule of **Erie Rd. Co. v. Tompkins**, supra, the Circuit Court was bound by the decision of the State Supreme Court on this question. The reasoning of the Circuit Court, however, was in no way impugned, and, on the contrary, in the most recent pronouncement of the United States Supreme Court on this subject, **J. I. Case Co. v. National Labor Relations Board**, (1944), 321 U. S. 332, 88 L. Ed. 762, the "two contracts doctrine" was reaffirmed in the following language, commencing at page 766:

> "Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than a contract of employment. Without pushing the analogy too far, the agreement may be

likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established. Indeed, in some European countries, contrary to American practice, the terms of a collectively negotiated trade agreement are submitted to a government department and if approved become a governmental regulation ruling employment in the unit.

"After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring. **This hiring may be by writing or by word of mouth or may be implied from conduct. In the sense of contracts of hiring, individual contracts between the employer and employee are not forbidden, but indeed are necessitated by the collective bargaining procedure.**

"But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, the insurer

the benefit of standard provisions, or the utility customer the benefit of legally established rates."

This statement of the relation of individual contracts of employment to collective bargaining agreements was expressly approved by the United States Supreme Court in **Order of Railroad Telegraphers v. Railway Express Agency, Inc.** (1944) ,321 U. S. 342, 88 L. Ed. 788.

Applying this reasoning to the case at bar, we have a parol contract of hiring made between the Appellee and the Railroad nearly ten years before the negotiation of the collective bargaining agreement, at a time when, for all that appears, Appellee was neither a member of the Brotherhood nor was the Brotherhood the authorized bargaining agent for the Railroad's employees. Granting, for the sake of argument, that when the collective bargaining agreement was made in 1934, Appellee, by continuing in his employment, tacitly ratified the agreement and adopted its terms, we are still unable to see how Appellee's parol contract of hiring in 1925 could be established by proof of the written collective bargaining agreement of 1934, which undoubtedly sets up the wage rates and working conditions of the industry, but creates no individual contracts of personal employment.

This being the case, Appellee's contract of employment, that is, the agreement of the Appellee to serve, and the agreement of the Railroad to accept his services as its employee, is not provable by a writing. Only the extrinsic incidents of the relationship so created, that is, the rate of compensation, the hours of labor, and the conditions of employment (including the rules relative to suspension and discharge) are provable by a writing. But it is well established that a contract partly oral and partly in writing, is in legal effect, an oral contract, an action on which is governed, as to the period of limitation, by the Statute,

governing verbal contracts generally. **37 C. J. 763, Sec. 96, note 18; 34 Am. Jur. 76, Sec. 92, note 19.** And it has been said that "the statutory description of an action as 'founded on an instrument in writing' or equivalent phrase refers to contracts, obligations, or liabilities growing, not remotely or ultimately, but immediately, out of written instruments" See **37 C. J. 756, Section 86, note 46.** This rule has also been enunciated by the Supreme Court of Nevada, construing **Section 8524, N. C. L., 1929,** in the case of **Stephens et al v. McCormack** (1928, Nev.) 263 P. 774. Citing with approval the California case of **Chipman v. Morrill,** 20 Cal. 130, 136, decided under a statute worded almost identically with **Section 8524 N. C. L., 1929,** the Supreme Court said at page 776 of its opinion:

"The construction which appellant seeks to have us place on the words, 'founded upon an instrument in writing,' was rejected, and we think correctly, in the foregoing decision. The court said:

> 'The question is whether the present action is, in the meaning of the statute 'founded upon an instrument of writing.'' Our conclusion is that this is not thus founded, **that the statute by the language in question refers to contracts, obligations, or liabilities resting in, or growing out of written instruments, not remotely or ultimately, but immediately;** that is, to such contracts, obligations, or liabilities as arise from instruments of writing executed by the parties who are sought to be charged in favor of those who seek to enforce the contracts, obligations, or liabilities. The construction would be the same if the word "founded" were omitted, and the statute read, "upon any contract, obligation, or liability upon an instrument of writing".'

"Appellants attack this construction and claim that the word 'founded' is read out of the statute. They say this is

contrary to the decisions of this court holding that, when possible, effect must be given to every word of an act. To this it is sufficient to say that we cannot perceive how the word 'founded' in any way qualifies the meaning of the word 'upon' as used in the statute.

"In **McCarthy v. Water Co.**, 111 Cal. 328, 43 P. 956, it was said:

> **'But a cause of action is not upon a contract founded upon an instrument in writing, within the meaning of the Code, merely because it is in some way remotely or indirectly connected with such an instrument, or because the instrument would be a link in the chain of evidence establishing the cause of action.** In order to be founded upon an instrument in writing, the instrument must itself contain a contract to do the thing for the nonperformance of which the action is brought.'

"These constructions of a stutue the same as ours, except as to the time of limitation, were approved in **Thomas v. Pacific Beach Co.**, 115 Cal. 136, 46 P. 899."

Similar views of the proper construction to be placed upon Statutes of Limitations for causes of action "founded on an instrument in writing have been expressed in **Sommer v. Nakdimen** (C. C. A. Ark. 1938), 97 F. (2) 715; **Pond Creek Mill & Elevator Co. v. Clark** (C. C. A. Illinois, 1921), 270 F. 482; **Societe Nouvelle d'Armament v. Barnaby**, 246 F 68, 158 C. C. A. 294; **Pickering v. Leiberman** (D. C. Del. 1890), 41 F. 376; **Frishmuth v. Farmers' Loan & Trust Co.**, 107 F. 169, 46 C. C. A. 222; **Boggs Oil & Drilling Co. v. Helmerich & Payne**, 67 P. (2) 579, 145 Kans. 747; **Petty & Riddle, Inc. v. Lunt**, 138 P. (2) 648; **Bracklein v. Realty Insurance Co.**, 80 P. (2) 471, 95 Utah 490, rehearing denied, 82 P. (2) 561, 95 Utah 506; **Manuel v. Hicks Iron Works**, 14 P. (2) 756, 216 Cal. 459.

It follows from what has been said that Appellee's parol contract of employment, made in 1925, as distinguished

from the extrinsic incidents of that employment set forth in the collective bargaining agreement of 1934, is to be deemed a contract "not founded upon an instrument in writing" and therefore governed by the four rather than the six year Statute of Limitations. **Section 8524 N. C. L., 1929.** This must necessarily be so for any or all of the following reasons: **First,** the contract of hiring creating the empolyer-employee relationship, in and of itself was admittedly either a verbal contract or one implied in fact, and consequently not provable by a written instrument. **Second,** even though the extrinsic incidents of the employer-employee relationship created by the written agreement of 1934 are provable by a written instrument, the most that can be said is that the contract of hiring is therefore partly provable by a writing and partly by parol, and it is settled doctrine that for purposes of the Statute of Limitations such a contract is governed by the Statute applicable to verbal contracts. **Third,** the mere fact that the written agreement of 1934, in the words of the **McCarthy case, supra,** "would be a link in the chain of evidence establishing the cause of action" would not be enough to sustain the position that Appellee's cause of action is "founded upon an instrument in writing."

It may be argued, however, that the very wrong of which Appellee complains consists of the alleged violation by the Railroad of one of the extrinsic incidents of the employment which is ascertainable from the written collective bargaining agreement. Appellee alleges, for example, that his suspension and discharge were wrongful in that the Railroad did not follow the procedures prescribed in Rules 37 and 38 of the agreement, quoted above, setting up certain safeguards relative to the disciplining of employees. If such alleged violation were the sole basis of Appellee's cause of action, there might be something to be said for this point of view. But Appellee claims much more for his cause of

action. In Paragraph XXI of his complaint, he alleges that under the agreement of November 1, 1934, he was entitled to employment for life, or, in the alternative, until he should reach the age of 65, and in the subsequent portions of the same paragraph alleges damages based upon the theory of such permanent employment. Since an examination of the agreement of November 1, 1934, set forth in haec verba as Exhibit "A" to Appellee's Complaint, does not reveal an express provision for permanent employment, such provision, if it exists at all, must be imported into the contract by reason of custom or usage. And this, indeed, has been Appellee's position throughout these proceedings. For example, in his "Points and Authorities Accompanying Pre-Trial Statement," Appellee says:

> "The contract, in view of all the circumstances, was a contract for permanent employment or for life (or until Plaintiff should be entitled to retirement under the provisions of the Railroad Retirement Act, Secs. 228-A, 228-S, 45 U. S. C. A.), subject to the right of discharge for cause after a full hearing under the provisions of Rule 37.
>
> "Contracts of employment will be construed in view of well-established customs of the trade to which it relates. 39 C. J. 41.
>
> "In the case of railroad employees it is customary for a man to continue his employment throughout his life or until he is qualified to retire under the provisions of the Railroad Retirement Act and undoubtedly the contract in question was made with these considerations in view."

On the merits of these contentions, it is sufficient to state that where a custom is relied upon to attach incidents to a contract of employment, or to any contract for that matter,

it is necessary to plead and prove not only the custom itself but all the essential elements which go to make the custom valid and binding as between the parties, such as knowledge of the custom on the part of the person to be charged at the time of entering into the contract, or facts showing that the custom was so well known that knowledge is to be presumed. **25 C. J. S. 125, Section 32 (b), Notes 13 and 14.** These essential elements cannot be proved under the general issue. **Cudahy Packing Co. v. Narzisenfeld** (CCA, NY) 3 F. (2d) 567. In having failed to plead or prove such custom or the elements prerequisite to its incorporation into the contract, Appellee could not possibly recover damages upon the theory of a permanent or lifetime employment. Nevertheless, Appellee's error in having failed to properly plead these matters, does not alter the fact that Appellee's entire cause of action was predicated upon the theory of a permanent or lifetime employment. This is clearly shown by Appellee's theory of damages. Since such permanent or lifetime employment could only have been shown, if at all, under proper pleadings, by introducing evidence extrinsic to the written agreement of November 1, 1934, we return to the proposition that **where evidence aliunde must be used to show the existence of the obligation itself, as distinguished from the details of the obligation, the action is subject to the Statute of Limitations applicable to oral contracts.** See **129 A. L. R. 603, at 613 and particularly Homire v Stratton & T. Co. (1914) 157 Ky. 822, 164 SW 67.** The obligation to which we refer, of course, is the alleged obligation of appellants to employ appellee for life or until he should be entitled to retirement under the provisions of the Railroad Retirement Act, subject to the right of discharge for cause after a full hearing under the provisions of the agreement of November 1, 1934.

We conclude that appellee's action for damages for his alleged wrongful suspension and discharge was gov-

erned by the four year Statute of Limitations applicable to contracts "not founded upon an instrument in writing" and that it was reversible error for the District Court to sustain Appellee's motion to strike from Appellants' Answer the Third Defense, setting up **Section 8524 N. C. L., 1929, in bar.**

POINT TWO

The verdict for appellee is not supported by the evidence, is contrary to the evidence, and so plainly excessive in the amount of damages awarded as to indicate that it was influenced by passion or prejudice.

Under this heading, we propose to discuss, appellants' fourth, fifth, and sixth assignments of error. (P. R. 184.)

Appellee was awarded a verdict fixing his damages at $8,675.40 for time lost by Appellee by reason of his suspension from the service of the Railroad and for his discharge from such service in alleged violation of his contract of employment.

The evidence shows that Appellee was out of service at his own written request for leave of absence from the time of his injury in February, 1934, until May 25, 1936, the date upon which his last leave of absence expired. (P. R. 61-69). The evidence also shows that in three successive medical examinations conducted on May 21, July 25, and August 4, 1936, respectively, Appellee was found by the Railroad's doctors to be physically incapable, due to his injury, of performing his duties as car man "with safety to himself and others," (P. R. 94-97, 105-107). As a result, on October 20, 1936, he was notified that he had been "disqualified from returning to work as car man." (P. R. 60). It further appears that Appellee was not passed or approved by the Appellants' medical department until October 22, 1937, at which time one of the Railroad's doctors found him physically qualified for "live track duty." (P. R. 52).

Since Appellee was not physically capable of resuming his duties until after October 22, 1937, his suspension from May 25, 1936, until that date must be considered justified under Appellants' "Rules Governing the Determination of Physical Qualifications of Employees," which

were shown to be one of the conditions of employment of each of the employees of Appellants' operating department. (P. R. 103-104).

The principal point at issue, however, is whether or not the evidence shows that Appellants offered, in good faith, to return Appellee to work without prejudice, either on, or at some time prior to October 31, 1938. The uncontradicted testimony of Appellants' witness, J. W. Burnett, who at that time was General Superintendent of Motive Power for the Railroad and represented the Railroad in negotiations with Mr. Thomas J. Eney, Appellee's agent and representative, relative to Appellee's reinstatement, was that some time prior to October 31, 1938, he had offered Mr. Eney to permit Appellee to return to work without prejudice to Appellee's claim for compensation for the time he had lost up until the time of this offer. We quote from Mr. Burnett's testimony, appearing at page 115 of the Printed Record:

> "Q. Prior to that time, Mr. Burnett, you did make an offer to Mr. Eney to return Mr. Olive to work providing he would waive his back time, did you not?
>
> "A. **Prior to that time I told Mr. Eney that he could go to work if and when he was approved by the medical department** and Mr. Eney advised me that he wanted back pay and in those cases we can't settle any back pay arguments at the time we authorize a man to go to work. **That is for later consideration and we couldn't even talk to Mr. Eney about back pay to Mr. Olive until he went back to work and appealed his back pay with the organization set up to handle such matters.**"

This testimony is substantiated by two letters from Mr. Eney to Mr. Burnett, dated July 26, 1938 and October 21,

1938, respectively, appearing at pages 113 to 115 of the Printed Record, we read as follows:

"J. W. Burnett, July 26, 1938
Gen. Supt. M. P. & M.,
Omaha, Nebraska.
Dear Sir:

"In reply to your letter of July 12, with reference to the case of W. L. Olive, Carman at Las Vegas, Nevada.

"Wish to state that the Executive Board of the B. R. C. of A., on the Union Pacific System in Ogden, Utah, on June 5, 1938, requested me to negotiate return to service W. L. Olive pending settlement of his claim for compensation from May, 1935, up until the time he was returned to service.

"**As per your previous letter which you stated that you would have Olive re-examined and if physically fit he would resume his service as Car Inspector at Las Vegas. Wish to inform you that Mr. Olive refuses to accept this settlement**; therefore in accordance with the wishes of the Executive Board, I placed the complete file in the hands of the General President of the B. R. C. of A., Felix H. Knight, Kansas City, for final disposition. I will advise you that you may receive copy of the reply when I hear from him concerning this case.

"Very truly yours,
"THOS. J. ENEY,
"General Chairman J. P. B."

"Mr. J. W. Burnett, October 21, 1938
Gen. Supt. M. P. & M.,
Omaha, Nebraska.
Dear Sir:

"This is in reply to your letter of October 22, File No. 011-122-2, received at this office October 27, in which you refer to conference in connection with the case of W. L. Olive, Carman at Las Vegas, Nevada.

"You state that you are agreeable to returning Mr. Olive to service and that you will not assume any responsibility for Mr. Olive's failure to return to service since October, 1937.

"If, as Mr. Olive requests, you will return him to service with compensation from May, 1935, up until the present time, he is agreeable to return to service. As you have refused this, he has been so notified and it is within his jurisdiction to determine his own responsibility.

"As stated before in conference, I have turned the file over to the General President, F. H. Knight, upon request of the Executive Board of the Joint Protective Board of the Carmen.

"Very truly yours,
"(Signed) THOS. J. ENEY,
"General Chairman J. P. B."

It will be noted that these letters are from Appellee's representative, admittedly authorized to represent Appellee in negotiations with the Railroad relative to Appellee's reinstatement. (P. R. 144). From the first letter, it is unmistakable that Mr. Burnett offered to restore Appellee to service provided he could pass a physical examination, and that Appellee refused to acquiesce in this arrangement. From the second letter, it is apparent that Mr. Burnett had

offered to return Appellee to service and therefore disclaimed responsibility for Appellee's failure to return to service since October, 1937, the first date at which Appellee had been declared physically qualified by a Railroad doctor. It is also clear that Appellee refused to so return to service unless first compensated for time lost since May, 1935, which would include the period between May, 1935 and October, 1937, during which he was physically disqualified from working for the Railroad.

It is true that it is not entirely clear from these letters that Mr. Burnett had made his offer without prejudice to subsequent consideration and settlement of Appellee's claim for compensation for time lost subsequent to May, 1935. But the letters are capable of such inference, and that was the substance of Mr. Burnett's testimony, which is further fortified by the admissions on this score of Mr. Eney, who, it will be remembered was Appellee's authorized representative in these negotiations.

Mr. Eny testified that he had discussed Appellee's case with Mr. Burnett on three occasions. (P. R. 119). At page 121 of the Printed Record, Mr. Eney testified as follows:

> "Q. And accepted employment, you say?
>
> "A. I say he was to return to accept his employment at Las Vegas. That was my understanding with the management.
>
> "The Court: Do you know why he didn't?
>
> "A. Well, I would say—he was concerned about the adjustment of the time that was involved, the compensation involved of him being out of employment at the time.
>
> "The Court: **Well, was there anything said between you and Mr. Burnett to the effect that he was not to receive the compensation for time off?**
>
> "A. "Well, I made demands on the company, my

letter states there, from 1935. **However, they wouldn't accept that but they did agree that he could return to service and we could subsequently go in and determine how much the value of the time lost would be.**

"The Court: Did Mr. Olive refuse to proceed with that?

"A. He evidently did. He isn't working.

At page 125 of the Printed Record, Mr. Eney testified as follows:

"A. It begins to come to my memory now from the receipt of that telegram, that we held a conference on the subject of returning him to service and **it was agreed with the management that we would put him back, pending the suit of his.** I tell you the reason why, too. The organization, the committee board appealed over that statement and it was referred to them in the session and continuation in Ogden, Utah, and I was instructed to take the case up with the management further and get him back to employment and subsequently later take up the question of compensation.

"The Court: And did you do that?

"A. Yes, I wrote a letter to Mr. Burnett to that effect. I believe he read the letter.

"The Court: Did the company then offer to do that?

"A. They were agreeable for him to go back to work and discuss it later."

And, again, on Re-Cross Examination, Mr. Eney emphatically reaffirmed his preceding statements in the following language: **"No, he didn't have to go to work and waive anything. He could have gone to work and then re-**

quested compensation after he returned to service."

Accordingly then, it appears from the evidence that after Appellants had offered to take the Appellee back without prejudice to his claim, Appellee refused to return unless he was first compensated for time lost from May, 1935.

Prior to the trial of this action, the Appellants served upon the Appellee and filed herein a Request for Admission of Facts, and among the facts requested to be admitted were, "III. That at all times between November 1, 1934, and December 31, 1938, one Thomas J. Eney was General Chairman of Brotherhood Railway Carmen of America," and "IV. That before the commencement of this action, Plaintiff's case for his claimed unlawful suspension from service and discharge from service, by the Defendants, was, at Plaintiff's request and pursuant to Rule 35 of Agreement dated November 1, 1934, marked Exhibit 'A' and made a part of Plaintiff's Complaint, taken to the Foreman, General Foreman, and Master Mechanic, each in their respective order, by the authorized local Committee of said Brotherhood Railway Carmen of America, which Committee was also known as and called 'Local Protective Board of Brotherhood Railway Carmen of America,' and that said L. R. Jarrett, W. L. Thurmond, and Thomas J. Eney, were respectively, the representatives of said local Committee." (P. R. 142-143).

These requested facts were admitted, except that Appellee qualified his admission by alleging in his Response that "his claim was not given an investigation by the said General Foreman or Master Mechanic nor was he given any hearing whatsoever or at all." (P. R. 144). However, Appellee admitted that he had placed his case in the hands of the Local Committee and that Mr. Eney was the representative of the Local Committee, and, ipso facto, the agent of Appellee in his negotiations regarding this matter. Rule 35 of the Agreement between the Railroad Companies and

the Brotherhood (Exhibit "A" attached to Amendment to Paragraph X of Appellee's Complaint, P. R. 39) provides that such grievances shall be taken to the designated officials of the Railroad by the authorized Local Committee or its representative; and it is admitted that Thomas J. Eney was the representative of the Local Committee.

It is a well established principle of law that the principal is bound by the acts of his agent performed within the scope of his authority, and that knowledge of, or notice to, an agent is binding upon his principal so far as it concerns the business conducted through the agent even though the agent does not in fact inform his principal thereof. **3 C. J. S. 194, Par. 262.** Consequently, the Railroad's offer to restore Appellee to service without prejudice to his claim for compensation, made to Appellee's agent, Mr. Eney, was binding upon the Appellee, even though this offer was never communicated to him by Mr. Eney.

It should be noted that there is not one iota of evidence in the record showing that Appellee ever was discharged by Appellants except Appellee's own testimony that the note of October 20, 1936, informing him that he had been "disqualified from returning to work as a car man," constituted his discharge. (P. R. 75). And it has been shown already that this notice was simply the end product of three successive physical examinations in which Appellee had been found physically unable to resume his duties as car man "with safety to himself and others." It is also apparent from the record that the physical incapacity continued until October, 1937, when Appellee was first qualified by one of the Railroad's doctors. That he did not return to work thereafter is attributable solely to the unwarranted demand made by Appellee to be ompensated for wage losses during the period of his physical disqualification, a demand with which appellant was not bound to comply. **Williams vs. Maryland Glass Corporation**, 134 Md. 320

106 A 755.

But, assuming for the sake of argument, that Appellee, as he claims, was improperly suspended on May 25, 1936, and wrongfully discharged on October 26, 1936, it is Appellant's position that when their unconditional offer to reinstate Appellee in his former position was made to his agent, Mr. Eney, on, or some time prior to October, 1938, Appellee was bound to accept the offer and return to his employment, and, having failed to do so, is not entitled to recover damages for time lost subsequent to October, 1938. **Dary v. The Caroline Miller (1888, D. C.) 36 Fed. 507; Ryan v. Mineral County High School Dist. (1915) 27 Colo., App. 63, 146 Pac. 792; Rottlesberger v. Hanley (1912) 155 Iowa 638, 136 N. W. 776; Hussey v. Holoway (1914) 217 Mass., 100, 104 N. E. 471; Flickema v. Henry Kraker Co. (1930) 252 Mich., 406, 233 N. W. 362; 72 A. L. R. 1047; Birdsong v. Ellis (1884) 62 Miss., 418; Squire v. Wright (1876) 1 Mo. App. 172; Price v. Davis (1915 187 Mo., App. 1, 173 S. W. 64; Bigelow v. American Forcite Powder Mfg. Co. (1886) 39 Hun. 599; Levin v. Standard Fashion Co. (1890) 16 Daly 404, 11 N. Y. Supp. 706; Connell v. Averill (1896) 8 App. Div. 524, 40 N. Y. Supp. 855; Heiferman v. Greenhut Cloak Co. (1913) 143 N. Y. Supp. 411 (reversed in 1913) 83 Misc. 435, 145 N. Y. Supp. 142, which was later reversed without opinion and original order of trial court reinstated (1914) 163 App. Div. 939, 148 N. Y. Supp. 1119; Stockman v. Slater Bros. Cloak & Suit Co. (1920) 182 N. Y. Supp. 815; Lemoine v. Alkan (1916) 33 Philippine 162; Best v. Hermanos (1918) 37 Philippine 491; Texas Benev. Assoc., v. Bell (1887) 3 Tex. App. Civ. Cas. (Willson) 335. See Annotation 72 A. L. R. 1049 at 1054.**

If Appellants are correct in this contention, then the verdict for Appellee in the sum of $8,675.40 is plainly excessive and contrary to the evidence. According to his own testimony, at the time Appellee last worked for the

Railroad, he was receiving a wage of $6.72 per day and working five days per week; so that his annual earnings must have totaled something less than $1800.00 per year. (P. R. 72). During the time of Appellee's suspension from his employment with the Railroad, he admittedly earned $900.00 per year in other employments. (P. R. 83). Under the instructions of the Court, the amount of damages to which Appellee would be entitled, if any, would be the difference between the amount he could have earned, had he remained in the Railroad service, and the amount he earned at other work during the time of his suspension, or a sum not in excess of $900.00 per year. Judging by the amount of their verdict, the jury must have figured that Appellee was out of service unlawfully for a period of at least nine and one-half years, which, even assuming that his unlawful suspension commenced in May, 1936, was to allow damages for loss of wages until November, 1945. But we have already invited the attention of the Court to evidence showing first, that Appellee was properly suspended at least until October 22, 1937, due to his physical disqualification, and, second, that Appellants offered unconditional reinstatement to the Appellee not later than October 21, 1938, and probably some time before that.

Under these circumstances, we submit, the largest sum that the jury could properly have assessed against Appellants would have been for wages lost by Appellee through unlawful suspension from October, 1937, to October, 1938, or $900.00. It is said in **25 C. J. S. 994, Damages, Par. 200**: "Where the amount of the recovery, if any, in an action for breach of contract is a mere matter of computation, it is obvious that a verdict in excess of the sum ascertained by such computation cannot stand." And the rule is stated thus in **15 American Jurisprudence 660, Par. 230**: "A verdict in an action on a contract may be set aside as excessive where the law recognizes some fixed rules and prin-

ciples in measuring the damages from which it may be known that there is an error in the verdict. Otherwise stated, where a fixed standard or scale exists by which the damages may be calculated, the jury will not be permitted to depart therefrom. So, a verdict will be set aside where a calculation shows that the amount allowed is in excess of the damages proved or where there is no evidence whatever of a particular item of damages allowed." And it has been held that the true test for determining whether a verdict had been influenced by passion or prejudice is to compare the amount awarded with the evidence relied upon to support the award. **Gladstone v. Fortier,** 70 P. (2d) 255, 22 Cal. App. (2) 1; **Day v. General Petroleum Corporation,** 89 P. (2d) 718, 32 Cal. App. (2d) 220.

Applying these principles to the case at bar, we believe it is too self-evident to require further exposition that the verdict is not only excessive and entirely unsupported by the evidence, but is also contrary to the evidence, and that the judgment based thereon should be reversed.

All underscoring in this brief has been our own.

Respectfully submitted,
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